F. L. Thorpe & Co., Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 18–CA–11878–1

September 30, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On September 23, 1992, Administrative Law Judge Burton Litvack issued the attached decision. The Charging Party filed exceptions and a supporting brief and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The primary question presented in this case is whether the Respondent's unfair labor practices, committed during the course of a strike which all parties concede was an economic strike at its inception, converted that strike into an unfair labor practice strike. For the reasons which follow, we find, contrary to the judge, that the unfair labor practices did convert the strike.

Factual Background

The facts, as more fully set forth in the judge's decision, are as follows. The Respondent manufactures and sells Black Hills gold jewelry. The Union was certified on July 27, 1990; the parties met 14 times over the ensuing 9 months in an unsuccessful effort to negotiate a first contract. On April 27, 1991,[1] after learning that a strike was possible, Respondent's general manager, Terry Sanke, sent a letter to all unit employees advising them that they had the right to withhold their services in connection with a strike or to cross the picket line and that the Respondent would continue to operate and had the right to hire permanent replacements to do the employees' jobs.

On April 28, Supervisor Lamphere called employee Cox to tell her that the Union had decided to call a strike, that ''they'' would be working and would give her a ride to work, but that she had to resign from the Union in order to go back to work during a strike. Cox told Lamphere that she had decided to join the strike, and repeated Lamphere's remarks to at least six other employees.

On April 29, 67 of the 82 unit employees went on strike. That same day, Terry Sanke sent all employees a letter advising them that they had three options: to refuse to cross the picket line, in which case they could not be disciplined by the Respondent; to cross the picket line, in which case they could be fined by the Union; or to resign from the Union and return to work. The letter stated that employees who wanted to cross the picket line and avoid a union fine should resign from the Union first. Sanke included with the letter a sample resignation form with instructions for completing and returning it to the Union.

On May 11, striking employee Linda Smith called Supervisor Tribble because Smith wanted to return to work.[2] Tribble told Smith that in order to return to work she had to first sign a union resignation form and place it in the mail. Tribble also stated that Smith's anniversary date would be pushed back for every week she was out on the picket line. As a result of having this condition placed on her return to work, Smith decided to remain on strike. In addition, Smith testified that in July she told a union official that the Respondent had refused to reinstate her unless she first resigned from the Union.

Shortly after the May 11 conversation with Tribble, Smith told fellow striking employee Kruse what Tribble had said. Kruse called Tribble herself, who stated that Kruse had to sign a union resignation form and mail it, after which she could return to work. Tribble subsequently told Kruse that her anniversary date would be set back a week for every week she stayed out on strike. Kruse decided not to return to work because she did not want to lose the privilege of union membership.

The striking employees picketed the Respondent's plant on most if not all days of the strike, and there was much shouting back and forth between the picketers and Sandy Sanke in particular. In this regard, on several occasions in June, July, and August, Sanke shouted to employees such remarks as that they did not have jobs there anymore, that they were fired, that a particular employee was a ''jobless wonder,'' and that the strikers should go find a job and get a life.

These statements were widely discussed by the strikers, both on the picket line and at union meetings. Employee Theresa Otto testified that Sandy Sanke's repeated statements that the strikers were fired and did not have jobs were discussed at every union meeting during the strike, with employees asking many questions about whether strikers could be fired or not and whether there was anything they could do about Sanke's constantly telling them they had no jobs. Significantly, Otto also testified that, after being subjected to Sanke's remarks, the employees were so angry that ''if we don't get a fair contract, it wouldn't bother us

[1] All dates hereafter are in 1991.

[2] Smith first communicated her desire to return to work to Manager Sandy Sanke, who is Terry Sanke's wife. Sandy Sanke told Smith she could come back but should clarify this with Tribble.

if they went under.'' Employees Smith, Kruse, and Roxanne Boyer also testified that Sanke's statements were discussed at union meetings. Similarly, employee Katherine Bergstrom testified that the strikers' concerns had changed since the beginning of the strike, in that they wanted to go back as a group, displacing the permanent replacements hired by the Respondent.

On August 8, the Respondent posted and sent to each striking employee a letter stating that Respondent's management had not made or implied any statements that strikers no longer had jobs with the Respondent, explaining their rights as economic strikers, and telling them that any information they had to the contrary was inaccurate and should be disregarded. However, the judge found that Sandy Sanke continued, at least throughout the month of August, to tell strikers that they did not have jobs, to go home, that a striker was a jobless wonder, and that they were fired.

On October 4, after unfair labor practice charges had been filed concerning Tribble's conditioning reinstatement on employees' resigning from the Union, the Respondent again wrote to all employees advising them that no striking employees had been or would be discharged because they ''choose to exercise their lawful right to strike.'' The October 4 letter stated that any contrary statements should be disregarded, and that returning strikers would be accorded all rights provided by the National Labor Relations Act. The letter also advised the employees that resignation from the union ''is not and never has been'' a condition for returning to work, but did not mention the threats to set back strikers' anniversary dates.[3]

A subsequent letter dated October 8 disavowed any threat to set back anniversary dates, as well as again disavowing any statements that strikers were fired or had to resign from the union in order to return to work. This letter further stated that ''[i]f such actions and statements were made, they were unlawful,'' and promised not to engage in like future conduct. Although not mentioned by the judge, the letter specifically assured employees that they had not and would not be discharged for striking, that they could return to work without resigning from the Union, and that their anniversary dates had not been altered because of the strike. On October 11, following the receipt of these letters, the Union unconditionally offered to return its members to work. As of October 14, the Respondent had 36 permanent replacements and 19 employees who had either never joined the strike or had previously abandoned it; 21 former strikers received reinstatement letters and 11 accepted reinstatement. Thus, after the reinstatement offers had been accepted, the Respondent employed 36 permanent replacements, 19 cross-over employees, and 11 former strikers.

The Judge's Decision

The judge found that Lamphere's statement that strikers had to resign from the Union before they could return to work, Tribble's statement that the strikers' anniversary date would be set back for each week they were on strike, and Sandy Sanke's statements that the strikers no longer had jobs, no longer worked at the plant, or were fired, all violated Section 8(a)(1). In addition, the judge found that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate employees Smith and Kruse unless they first resigned from the Union. There are no exceptions to these findings.[4]

However, the judge rejected the General Counsel's contention that these unfair labor practices prolonged the strike and thus converted it into an unfair labor practice strike. The judge recognized that the Board has found that requiring strikers to resign from the Union as a condition of reinstatement is ''an unfair labor practice that, by its nature, has a reasonable tendency to prolong the strike.'' *Gaywood Mfg. Co.*, 299 NLRB 697, 700 (1990).[5] Nevertheless, the judge found that all of the former strikers who testified stated that their discussions with other strikers concerning continuing the strike focused on economic concerns, and that the unfair labor practices were never cited in such discussions as a reason for continuing the strike. The judge also found that the unlawful conditions placed on reinstatement were not disseminated among unit employees sufficiently to support a finding of conversion. Thus, perceiving no evidence showing that the strikers' subjective motivation was affected by the unfair labor practices the judge found that the unfair labor practices did not prolong the strike and thus that there was no conversion.

The Exceptions

The Union excepts to the judge's finding that the strike was not converted to an unfair labor practice strike on May 12. Initially, the Union contends that the unfair labor practices present in this case should be deemed to have converted the strike ''as a matter of law.'' The Union notes that the Board has found that conditioning strikers' reinstatement on resigning from the union is conduct which would ''necessarily delay resolution of the strike,'' citing *Gaywood Mfg. Co.*,

[3] On September 30, the Respondent advised Kruse and Smith that it would reinstate them, on request, to their former or substantially equivalent positions. On October 7, the Respondent additionally promised to pay both employees all backpay due under the Act. Smith and Kruse did not respond to these offers prior to the strike's end.

[4] The Respondent did not call any witnesses. The judge credited all of the General Counsel's witnesses except to the extent that two witnesses' testimony is in conflict.

[5] The judge found that Sanke's statements to picketing employees were not of this character, however, inasmuch as no employee was actually terminated.

above, and argues that, in *Champ Corp.*, 291 NLRB 803 (1991), the Board also found that statements of the sort made by Sandy Sanke would reasonably lead employees to think that they had in fact been discharged.

The Union also excepts to the judge's finding that there was no subjective evidence that the unfair labor practices motivated the strikers to prolong the work stoppage. In this regard, the Union argues that Kruse and Smith indisputably continued their participation in the strike because of Tribble's unlawful condition on their reinstatement, and that the strike might have ended earlier if they had returned to work and other strikers had perceived the erosion of support for the strike at that time. The Union did not specifically except to the judge's findings concerning dissemination, but rather asserts in its brief only that the evidence of Lamphere's prestrike unlawful statement to Cox, and her testimony that she told six other employees what Lamphere had said, establishes ''the potential'' that these seven employees, in addition to Kruse and Smith, continued on strike in part because of the unfair labor practices. Finally, the Union contends that the judge erred in finding that Sandy Sanke's unlawful statements did not prolong the strike.

The Respondent has excepted to the judge's failure to find that, even if the strike was converted to an unfair labor practice strike, it was reconverted to an economic strike prior to the Union's unconditional offer to return to work. In this regard, the Respondent contends that the August 8, October 4, and October 8 letters repudiated the unfair labor practices sufficiently to compel a finding that the strike was reconverted into an economic strike prior to October 11, the date the Union submitted an unconditional offer to return to work on behalf of the striking employees.[6]

Discussion

The standard applied by the Board to determine whether a strike has been converted to an unfair labor practice strike is well settled. Thus, the General Counsel may show that the unfair labor practices were a factor that caused a prolongation of the work stoppage by relying on both subjective and objective factors. *Gaywood Mfg. Co.*, above at 700. Further, the General Counsel must prove only that ''the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage.'' Id.

With regard to objective factors, the Board has recognized that ''[c]ertain types of unfair labor practices by their nature will have a reasonable tendency to prolong the strike and therefore afford *a sufficient and independent basis for finding a conversion*.'' *C-Line Express*, 292 NLRB 638 (1989) (emphasis added). In the instant case, we find, contrary to the judge, that the Respondent has committed unfair labor practices of this character. In this regard, we rely particularly on the unfair labor practices committed by the Respondent's manager, Sandy Sanke. As set forth more fully above, Sanke repeatedly told picketing strikers that they were fired, that they should go home, and that they no longer had jobs because of their protected strike activity. As the judge noted, these statements were widely disseminated as well. Moreover, Sandy Sanke is one of the Respondent's top management officials and the wife of its general manager. Particularly in light of Sanke's high position in the Respondent's managerial hierarchy, we find that her statements of termination reasonably tended to prolong the strike. See *Gulf Envelope Co.*, 256 NLRB 320, 325–326 (1981).[7]

The judge found, and we agree, that the Respondent's conditioning the strikers' reinstatement on their first resigning from the Union also is conduct which reasonably tends to prolong a strike. As the Board observed in *Gaywood* at 700:

> [T]he Respondent's unlawful conditioning of reinstatement on resignation from the Union is comparable in effect to conduct such as an unlawful withdrawal of recognition during an economic strike—an unfair labor practice that, by its nature, has a reasonable tendency to prolong the strike. . . . the Respondent's unlawful statements concerning resignation would necessarily delay resolution of the strike by creating an issue to be resolved individually by striking employees who had made or were willing to make unconditional offers to return to work—i.e., whether the employee should resign from the Union in order to

[6] The Respondent also notes that, on September 30, it advised Kruse and Smith that it would reinstate them, on request, to their former or substantially equivalent positions and, on October 7, additionally promised to pay both employees all backpay due under the Act.

[7] In finding that these unfair labor practices did not convert the strike, the judge relied on the Board's decision in *C-Line Express*, 292 NLRB at 639, finding that the employer's unlawful statements that it did not want certain picketers back, would not sign a contract with the union and would not reemploy many of the strikers, did not objectively tend to prolong the strike because, as in this case, ''there is no evidence that the [employer's] co-owners tried to make good on their threats.'' We find *C-Line* distinguishable, however, as that case did not involve repeated statements, like those here, by a high management official, that employees in fact *had been* terminated. Employees, of course, would have no means of determining whether the Respondent had taken concrete steps to process their termination, and would have no effective means of doing so until after the strike had ended. Thus, in contrast to the threats of future termination discussed in *C-Line*, Sandy Sanke's unlawful statements could reasonably lead employees to think that their terminations had, in fact, already been accomplished, and hence reasonably tended to prolong the strike even though no employee was shown actually to have been terminated. *Gulf Envelope Co.*, above.

make an offer to return that would be acceptable to the Respondent.

See also *Chicago Beef Co.*, 298 NLRB 1039 (1990), enfd. mem. 944 F.2d 905 (6th Cir. 1991). However, we disagree with the judge's finding that these unfair labor practices were not sufficiently disseminated to have played a role in converting the strike. Thus, as noted above, the Respondent's unlawful conditioning of reinstatement was disseminated to at least six other employees and to a union official. The Board has found that a similar degree of dissemination was sufficient to establish that unlawfully conditioning reinstatement on resigning from the union prolonged and thus converted a strike. See *Gaywood Mfg. Co.*, above, 299 NLRB at 700 (employees who were unlawfully denied reinstatement discussed the matter with some of their fellow workers and with the union's president).

Turning to subjective factors, we find that the record also contains ample evidence that the strikers' subjective motivations for continuing the strike in fact did change as a result of the unfair labor practices. In this regard, the Board has recognized that '''the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice''' *C-Line Express*, 292 NLRB 638 (1989) (quoting *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1980)). Thus, and contrary to the judge, proof of strikers' subjective motivations is not limited to evidence that the strikers specifically discussed the unfair labor practices as reasons for continuing the strike.[8]

The Board has recognized that self-serving, after-the fact characterizations of strikers' motivations are to be accorded relatively less weight in determining whether a conversion has occurred.[9] On the other hand, the Board has never held that a conversion will be found only where employees as a group expressly vote or decide to continue on strike because of unfair labor practices. Rather, at least where, as here, the unfair labor practices are of a type which the Board has found objectively tend to prolong a strike, the Board has inferred a change in strikers' subjective motivations where there is evidence that the unfair labor practices ''caused consternation among the striking employees.'' *Chicago Beef*, above, 298 NLRB at 1040. See also *Gaywood Mfg. Co.*, above (same).

Applying this standard, we find ample evidence that the unfair labor practices committed by the Respondent caused consternation among the employees so as to prolong the strike. As noted above, the Respondent's unlawfully conditioning three employees' reinstatement on their first resigning from the Union was disseminated to at least six other striking employees and to a union official. Further, Sandy Sanke's repeated statements that the strikers were fired and no longer had jobs also caused substantial consternation among the employees, inasmuch as they were discussed at all of the union meetings during the strike and angered the employees enough to make them wish, in the words of striking employee Otto, that the Respondent would ''go under'' unless they got a fair contract.[10] That the Respondent's actions were cause for concern was further evidenced by the Respondent's letters sent to employees in an effort to disavow its unlawful activities.

Thus, the subjective evidence of a shift in the motivation underlying the strike is not of the self-serving after-the-fact sort cautioned against in *C-Line* and *Soule Glass*. And, under strikingly similar circumstances, the Board has found that evidence of this type was sufficient to demonstrate conversion. See, e.g., *Gaywood*, above (conversion found, where two of four employees who were denied reinstatement dis-

[8] In light of the Board's clear statement in *C-Line* that strikers' testimony concerning their own subjective motivations for continuing the strike is admissible, we are troubled by the judge's evidentiary ruling limiting the witnesses to testifying concerning discussions they had in which reasons for continuing to strike were mentioned, and precluding testimony concerning the strikers' motivation which was not expressed to other employees. In this regard, it simply does not follow from the fact that the unfair labor practices may never have been expressly discussed by two or more strikers as reasons to continue the strike that the strikers' subjective motivations did not in fact change after the unfair labor practices were committed. Indeed, as the Board observed in *Pittsburgh & New England Trucking*, 238 NLRB 1706, 1707 (1978), enf. denied in part No. 78–1781 (4th Cir. 1979) (unpublished order), in reversing a judge's finding that the employer's unfair labor practices had not converted a strike into an unfair labor practice strike, employees may not even perceive the unlawful nature of the employer's actions, but ''we do not believe that the failure of the employees fully to perceive the unlawfulness of the threat can relieve the Respondent of the responsibility for its actions.'' See also *Gulf Envelope*, above. Accordingly, we decline to accord the absence of such discussions the controlling weight ascribed to it by the judge. Although not excepted to, we are also concerned that the judge's evidentiary rulings in this regard may have contributed to several witnesses' evident confusion when questioned about their motivations for continuing the strike.

For the foregoing reasons, we would admit testimony of an employee's subjective reasons for striking, *as expressed by the employee at the time of the relevant events*. Further, it is sufficient that the employee expressed the thought that he/she struck because of a given action by the employer. It is not necessary that the employee express the view that the action was unlawful. Finally, we would not admit testimony of an employee's subjective reasons for striking, as asserted for the first time at the hearing in the unfair labor practice case.

Member Devaney finds it unnecessary to decide whether he would *admit* such after-the-fact characterizations, as it is not necessary to pass on any testimony of this character in deciding this case.

[9] '''[I]n examining the union's characterization of the purpose of the strike, the Board and the Court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context.''' *C-Line*, above at 638 (citing *Soule Glass*, above at 1080).

[10] The judge dismissed Otto's testimony as indicating ''that the Respondent's unlawful conduct merely had the effect of angering and frustrating the strikers.'' As noted above, this effect is precisely one of the elements that the Board has focused on in finding a conversion.

cussed the matter with some of their fellow workers and with the union's president, who raised the issue in discussions with the employer); *Chicago Beef*, above (employee testified that he did not want to sign resignation form and refused to cross picket line for that reason, another employee testified that everyone on the picket line was discussing the forms and they were a matter of great importance to the striking employees, and employer had posted and sent a notice in an unsuccessful effort to repudiate unfair labor practices); and *La Famosa Foods*, 282 NLRB 316 (1986) (employer's threats and inducements were discussed among the employees and with a union delegate, and an employee testified that the strike was prolonged because the employees could not trust the Respondent under those circumstances). We see no basis for distinguishing these cases from the facts presented here. Accordingly, for the reasons set forth above, we find that the General Counsel has established that the strike in this case was converted to an unfair labor practice strike on or about May 12, 1991.

We also find that the strike was not reconverted to an economic strike by the Respondent's efforts to repudiate its unfair labor practices. In order to reconvert an unfair labor practice strike, an employer must ''unequivocally repudiate and rescind [its] unlawful actions.'' *Chicago Beef*, above at 1040. In *Chicago Beef*, the Board found that the employer's notice to employees, which stated that it did not require employees to resign from the union in order to work there, was ineffective to reconvert the strike because it did not mention the employer's previously imposed condition on strikers of resigning their union membership to obtain reinstatement, and because the employer continued to violate the Act by refusing to reinstate the strikers even after the notice was posted.[11]

[11] We do not suggest, however, that an unfair labor practice strike can never be converted back to an economic strike if an employer's attemped repudiation of the causative unfair labor practice fails to meet requirements for cure under the Board's standard in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Thus, in finding that the unfair labor practice strike at issue in *Chicago Beef* had not reverted to the status of an economic strike, the Board concluded that the Respondent's flawed repudiation effort ''did not cure the unfair labor practice *or otherwise remove it as a factor in prolonging the strike*.'' 299 NLRB at 1040 (emphasis added). In *Mohawk Liqueur Co.*, 300 NLRB 1075 (1990), affd. sub nom. *Distillery Workers Local 42 v. NLRB*, 951 F.2d 1308 (D.C. Cir. 1991), by contrast, the Board found that, although a particular unfair labor practice that had originally played a causative role in the strike at issue there was not completely remedied under *Passavant* standards, the continuation of the strike after the employer's attempted settlement of the matter was caused by the striking employees' concern over other issues, and there was no longer any causal connection between the earlier unfair labor practice and the maintenance of the strike. 300 NLRB at 1075 fn. 1, 1086. In the present case, unlike in *Mohawk Liqueur*, there is no evidence that other issues replaced the unfair labor practices as motivation for the strike.

Applying this standard, it is clear that the Respondent's August 8 and October 4 notices to employees did not reconvert the strike here. The August 8 letter stated that the Respondent had not made or implied any statements that strikers no longer had jobs with the Respondent, explained their rights as economic strikers, and stated that any information they had to the contrary was inaccurate and should be disregarded. This letter did not mention the Respondent's prior refusal to reinstate strikers unless they first resigned from the Union, nor did it mention Tribble's statement that anniversary dates would be set back. Moreover, as noted above, Sandy Sanke continued at least through the month of August to unlawfully tell strikers that they did not have jobs, to go home, and that they were fired. Under these circumstances, and in light of the letter's failure to specifically mention any of the Respondent's prior unlawful actions, we find that the August 8 letter did not unequivocally repudiate and rescind the Respondent's unfair labor practices or otherwise remove them as factors in prolonging the strike.

The October 4 letter, sent to strikers after unfair labor practice charges had been filed, is similarly defective. This letter again advised the employees that no striking employee had been or would be discharged because they ''choose to exercise their lawful right to strike,'' and went on to state that any contrary statements should be disregarded and that returning strikers would be accorded all rights provided by the Act. Although the letter advised the employees that resignation from the Union ''is not and never has been'' a condition for returning to work,'' it did not mention the threats to set back strikers' anniversary dates. Based on the letter's failure to specifically refer to the Respondent's past actions, and the absence of any reference at all to the anniversary dates threats, we find that this letter also fails to satisfy the Board's standards as set forth in *Chicago Beef*.

We find it unnecessary to pass on the sufficiency of the Respondent's October 8 letter in this regard, inasmuch as the Union offered to return the strikers to work on October 11, after receiving that letter.[12] We assume arguendo that the October 8 letter reconverted the strike into an economic strike when it was received by the strikers and the Union, and we assume further that the Union offered to return after it received the letter. However, there is no evidence that permanent replacements were hired in the interim period between

[12] The October 8 letter disavowed any threat to set back anniversary dates, as well as again disavowing any statements that strikers were fired or had to resign from the Union in order to return to work. This letter further stated that if such actions and statements were made, they were unlawful, and promised not to engage in like future conduct. The letter assured the employees that they had not been fired for striking, that they could return to work without resigning from the Union, and that their anniversary dates had not been altered because of the strike.

receipt of the letter and the offer to return. Thus, all replacements were hired at a time when the strike was an unfair labor practice strike. Under these circumstances, we find that the Respondent's failure to reinstate the strikers violated Section 8(a)(3) and (1) of the Act.[13]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 8.

''8. The strike against the Respondent was converted to an unfair labor practice strike on or about May 12, 1991. By failing and refusing to reinstate unfair labor practice strikers who had not been permanently replaced as of May 12, 1991, and who made unconditional offers to return, the Respondent violated Section 8(a)(3) and (1) of the Act.''

2. Delete Conclusion of Law 10.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We have found that the economic strike that began on April 29, 1991, was converted to an unfair labor practice strike on May 12, 1991. We have further found that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate unfair labor practice strikers following their unconditional offers to return to work. Accordingly, with respect to those unfair labor practice strikers who were not offered reinstatement, and who were not permanently replaced before May 12, 1991, and with respect to former striking employees Cindy Kruse and Linda Smith, whose reinstatement was unlawfully conditioned on their resigning from the Union as set forth above, we shall require the Respondent to reinstate them immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all replacements hired after May 12, 1991. If, after such dismissals, there are insufficient positions available for the remaining former strikers, those positions which are available shall be distributed among them without discrimination because of their union membership or activities or participation in the strike, in accordance with seniority or other nondiscriminatory practice utilized by the Respondent. The remaining former strikers who were not replaced prior to the conversion, as well as those former strikers who were permanently replaced prior to the conversion, for whom no employment is immediately available, shall be placed on a preferential hiring list in accordance with seniority or other nondiscriminatory practice utilized by the Respondent, and they shall be reinstated before any other persons are hired or on the departure of their preconversion replacements. See *Gaywood Mfg. Co.*, above; *Chicago Beef*, above.

The employees entitled to immediate reinstatement, as well as those unfair labor practice strikers who made unconditional offers to return to work and were offered reinstatement by the Respondent, shall be made whole for any loss of earnings they may have suffered by reason of the Respondent's refusal to reinstate them in accordance with their unconditional requests to be reinstated, in the manner set forth in the judge's decision.

ORDER

The National Labor Relations Board orders that the Respondent, F. L. Thorpe & Co., Inc., Deadwood, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in United Steelworkers of America, AFL–CIO–CLC, or any other labor organization, by failing and refusing to reinstate unfair labor practice strikers upon their unconditional offers to return to work who were not permanently replaced prior to the strike's conversion from an economic strike.

(b) Threatening employees that, if they engage in a strike, they would have to resign from the Union in order to gain reinstatement.

(c) Informing striking employees that they must first resign from the Union in order to be reinstated.

(d) Threatening to set back striking employees' anniversary dates 1 week for every week that they remain on strike.

(e) Informing striking employees that they are fired, no longer have jobs, or no longer are employed by the Respondent.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Linda Smith, Cindy Kruse, and all employees who were not offered reinstatement and were not permanently replaced prior to May 12, 1991, full and immediate reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary, any replacements hired on or after May 12, 1991.

[13] Member Devaney finds it unnessary to rely on the dates on which permanent replacements were hired. Rather, he would find that, in light of the short delay between transmittal of the Respondent's October 8 letter and the Union's October 11 offer to return to work, the strike remained an unfair labor practice strike at the time the Union submitted its unconditional offer to return to work.

(b) Place any remaining former strikers, who were not replaced prior to May 12, 1991, as well as any former strikers who were replaced prior to May 12, 1991, for whom no employment is immediately available, on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by the Respondent and offer them employment before any other persons are hired or on the departure of any replacements hired before May 12, 1991.

(c) Make whole Linda Smith, Cindy Kruse, and all unfair labor practice strikers to whom the Respondent failed to offer reinstatement upon their unconditional offer to return to work, for any loss of earnings which they may have suffered, in the manner set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board and its agents for examination and copying all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Deadwood, South Dakota facility copies of the attached notice, marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected, concerted activities.

WE WILL NOT fail and refuse to reinstate unfair labor practice strikers who were not permanently replaced prior to conversion of the strike.

WE WILL NOT threaten employees that they will have to resign from the United Steelworkers of America, AFL–CIO–CLC, or any other labor organization, in order to be reinstated after engaging in a strike.

WE WILL NOT inform striking employees who have unconditionally offered to abandon a strike that they must first resign from the Union.

WE WILL NOT threaten to set back the anniversary dates of striking workers 1 week for each week they remain on strike.

WE WILL NOT inform striking employees who engage in picketing of our plant that they are fired, no longer have jobs, or no longer are employed at our plant.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Cindy Kruse, Linda Smith, and all employees engaged in an unfair labor practice strike who were not permanently replaced prior to May 12, 1991, and were not subsequently offered reinstatement by us, immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements hired on or after May 12, 1991.

WE WILL place the remaining former strikers who were not replaced prior to May 12, 1991, as well as those former strikers who were permanently replaced prior to May 12, 1991, for whom no employment is immediately available, on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice and offer them employment before any other persons are hired or on the departure of any replacements hired before May 12, 1991.

WE WILL make whole Cindy Kruse, Linda Smith, and all unfair labor practice strikers who were not permanently replaced prior to May 12, 1991, to whom the Respondent failed to offer reinstatement upon their unconditional offer to return to work, for any loss of earnings which they may have suffered, with interest.

F. L. THORPE & CO., INC.

James L. Fox, Esq., for the General Counsel.
Kevin C. Berens, Esq. and *Jerylyn Bridgeford, Esq. (Berens & Tate)*, of Omaha, Nebraska, for the Respondent.
Delano Lords, Staff Representative, of Rapid City, South Dakota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. On August 27 and October 8, 1991, and January 9, 1992, respectively, an original, a first, and a second amended unfair labor practice charge in the above-captioned matter was filed by United Steelworkers of America, AFL–CIO, CLC (the Union). Following an investigation, the Regional Director of Region 18 of the National Labor Relations Board, (the Board), on January 21, 1992,[1] issued an amended complaint, alleging that F. L. Thorpe & Co., Inc. (Respondent), engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the commission of any unfair labor practices. The above-captioned matter came to trial before me in Lead, South Dakota on February 25 and 26, 1992. At the trial, all parties were afforded the opportunity to examine and to cross-examine the witnesses, to offer any relevant evidence into the record, to argue their legal positions orally, and to file posthearing briefs, which were filed by counsel for the General Counsel and by counsel for Respondent and were carefully considered by me. Accordingly, based on the entire record herein, including the posthearing briefs and my observation of the testimonial demeanor of the several witnesses,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a South Dakota corporation, with an office and place of business located in Deadwood, South Dakota, is engaged in the manufacture and wholesale sale and distribution of gold jewelry. During calendar year 1991, in the normal course and conduct of its above-described business operations, Respondent sold and shipped, from its Deadwood, South Dakota facility to customers located outside the State of South Dakota, goods and products valued in excess of $50,000. Respondent admits that, at all times material herein, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that, at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by informing an employee she would have to resign her membership in the Union before returning to work if she engaged in a strike, by warning employees that their anniversary dates would be set back 1 week for every week they remained on a picketline, and by telling employees, because they engaged in a strike, they were no longer employed by Respondent. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate employees, following unconditional requests to return to work, unless they resigned their memberships in the Union and, as Respondent's employees' economic strike was allegedly converted to an unfair labor strike by the above-described conduct, by refusing to reinstate striking employees to their former positions following unconditional offers to return to work. Respondent denied the commission of the alleged unfair labor practices and, if committed, denies that said conduct had the effect of prolonging the economic strike so as to convert it to an unfair labor practice strike. Further, Respondent contends that, if the strike was converted to an unfair labor practice strike, Respondent engaged in conduct having the effect of reconverting it to an economic strike and, thereby, relieving Respondent of the obligation to offer immediate reinstatement to former strikers.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The record establishes that Respondent, whose production facility is located in Deadwood, South Dakota, is engaged in the manufacture and sale of Black Hills gold jewelry and that its 10 to 12 carat gold products include such items as rings, pendants, stick pins, and belt buckles. Respondent's general manager is Terry Sanke who has overall responsibility for all aspects of the business; his wife Sandy is the credit manager, and Sanke's son is Respondent's safety director and purchasing agent.[3] Respondent employs 10 supervisors, including Carol Tribble and Judy Lamphere, who direct the production work,[4] and each reports directly to Terry Sanke. The record further establishes that the Union commenced an organizing campaign among Respondent's production and maintenance employees in 1990; that such culminated in a representation election on July 20, 1990; that the Regional Director of Region 18 certified the Union as the exclusive representative for purposes of collective bargaining of Respondent's production and maintenance employees on July 27, 1990; and that, through April 27, 1991, Respondent and the Union held 14 negotiating sessions in an effort to reach a collective-bargaining agreement.

Terry Sanke testified that, at the end of April, he became aware of the possibility that Respondent's production and maintenance employees would commence a work stoppage against the company. Thereafter, he drafted a letter, dated April 27, to all the bargaining unit employees, informing them that they had the right to withhold their services and engage in a strike, that Respondent would continue its manufacturing operations in the event of a strike, that the employees had the right to cross the picket line during a strike and work, and that, in order to continue operating, Respondent had the right to hire permanent replacement employees ''to do your jobs.'' Sanke added that the letter was disseminated to all bargaining unit personnel.

[1] Unless otherwise indicated, all events herein occurred during 1991.

[2] Respondent chose not to present any witnesses in its behalf. Accordingly, the testimony of the witnesses, who testified in behalf of the General Counsel, was uncontroverted.

[3] Respondent admits that Terry Sanke and Sandy Sanke are supervisors within the meaning of the Act.

[4] Respondent admits that Tribble and Lamphere are supervisors within the meaning of the Act.

Employee Susan Cox testified that, the next day, April 28, she received a telephone call from her supervisor, Judy Lamphere, who told her ''that the union has decided to go on strike and that they will be working Monday morning and that they . . . would supply us with a ride . . . and that I would have to sign a piece of paper resigning from the union . . . to go back to work.'' Cox replied that she had thought about the situation and had decided to join the strike. The conversation abruptly ended, and, according to Cox, she mentioned what was said by her supervisor to, at least, six other employees. There is no record evidence as to whether said conversations were prior to or subsequent to the start of the strike

The record reveals that 67 of Respondent's 82 production and maintenance employees commenced their anticipated work stoppage against Respondent on April 29, with the remaining 15 employees continuing to work.[5] That same day, not repeating the alleged condition for returning to work attributed to Supervisor Lamphere, Terry Sanke drafted another letter to the bargaining unit employees, advising them that they had three options during a strike: to refuse to cross the picket line, in which case ''the company may not discipline you;'' to cross the picket line and work, in which case ''you may be fined by the Union''; and to resign from the Union and return to work. Sanke added that, if employees wished to cross the picket line and be protected from being fined, ''[they] should first resign from the Union before crossing.'' While disavowing any intent to influence the employees' decisions, Sanke enclosed resignation forms and explained the procedure for completing and returning them to the Union. Apparently, this letter was posted inside the plant for employees (those who did not join the strike and strike replacements) to view and mailed to all striking bargaining unit personnel.

Notwithstanding what Terry Sanke wrote in his April 29 letter, two striking employees testified with regard to conversations with Supervisor Carol Tribble, in which she allegedly placed the identical condition for employees desiring to return to work as set forth by Judy Lamphere. Thus, striking employee Linda Smith, who had been promoted to a trainer inspector prior to the strike, testified that she had heard that someone had been hired to replace her; that she was upset and wanted to retain her position; and that, accordingly, on May 11, she telephoned Sandy Sanke ''and told her I thought I had made a mistake by going out on strike. And she said I had not made a mistake and I was welcome to come back'' but should ''clarify'' it with her Supervisor Tribble. Thereafter, admittedly crying, Smith telephoned Carol Tribble, and ''I told her that I wanted to come back. She told me that in order to come back that I had to sign the paper . . . that I had dropped out of the union. And I had to have it in the mail before I could come through the doors Monday morning.'' Tribble then told Smith that her anniversary date ''would be pushed back for every week I was out on the picket line'' and that she could not guarantee that Smith would retain her trainer inspector position. Smith subsequently decided to continue striking as a result of Tribble's stated condition for her return to work.[6]

Striking employee, Cindy Kruse, testified that, after the strike had continued for approximately a week, she received a telephone call on a Sunday from Linda Smith, who told her that Carol Tribble said she (Smith) would lose her job if she did not return to work. Stating that she became ''scared'' at the prospect of likewise losing her job, Kruse, who admitted having read Terry Sanke's April 29 letter and understanding she had three choices as a result of the strike, immediately telephoned Tribble. According to Kruse, ''I told Carol I wanted to come back to work, and she said before I could come back to work I had to sign a resignation form to resign from the union.'' Kruse said she did not have such a form, and Tribble told her to come to the plant the next morning in order to obtain one. Tribble added that, after Kruse deposited the form in the mail, ''then you can come back to work.'' Later that same day, Tribble telephoned Kruse about meeting to fill out the resignation form and, during the conversation, told Kruse that ''for every week that we were out on strike . . . . my anniversary date would be set back one week.'' Kruse further testified that she subsequently decided not to abandon the strike and return to work as her husband convinced her that the ''privilege'' of union membership would be taken from her if she crossed the picket line and returned.

The record establishes that the striking employees picketed at Respondent's facility, which is a two-story building with a parking lot in the rear, on most, if not all, days of the strike and that there was much shouting of invectives and insults between the strikers, the replacement employees, and Respondent's supervisors, especially Sandy Sanke. Deborah Young, a striking employee, testified with regard to an incident, involving Sanke, in late June. According to her, one afternoon, Sanke emerged from the plant building with some replacement employees, who were on a break period. Young, who was picketing along with 10 other strikers that day, stated that the ''usual practice'' was shouting between Sanke and the pickets; that, on this occasion, the pickets shouted that she was ''babying'' the replacement workers; and that Sanke yelled back at the pickets that ''they didn't have a job.'' During cross-examination, in an effort to impeach Young's testimony, counsel for Respondent had her identify a pretrial affidavit in which she stated that she was never present when Sanke told striking employees that they no longer had jobs. Thereupon, during redirect examination, Young identified a second pretrial affidavit in which she recounted that she was present, one day, when the replacement employees were leaving the plant and Sanke had, in fact, remarked that the striking employees no longer had jobs. Finally, during recross-examination, Young averred that her testimony, as to the replacement employees being on a break that day in June, was incorrect and that she was better at remembering ''ideas'' and ''things'' than times or exact words.

Linda Smith, Roxanne Boyer, and Rebecca Canning testified as to a similar incident, involving Sanke, while picket-

[5] Shortly after the start of the strike, in accord with what Terry Sanke wrote in his April 27 letter, Respondent began hiring replacement workers. In this regard, the record discloses that, as of May 10, 10 such individuals had been hired by Respondent and were working inside the plant.

[6] Smith decided to continue striking ''because I didn't feel as though I should have to drop out of the union in order to have my job back, and they couldn't guarantee me my position back, and . . . my anniversary date would be pushed back because I was out on the picket line.''

ing. According to Smith, who placed the event ''somewhere around July,'' 10 pickets, including Boyer, Canning, and Smith were in front of the plant on a Tuesday morning when Sanke left the plant in her red pickup truck. No one said anything to Respondent's credit manager, and, as she passed by the strikers, who were sitting on the tailgate of a station wagon, Sanke ''rolled her truck window down part way and called us chicken shits.'' Forty-five minutes later, Sanke returned to the plant, entered the property, and parked near the rear employee entrance, a few feet from the pickets. As she got out of her truck, Canning yelled to her that the employees were not ''chicken shits,'' which comment precipitated an exchange, involving insults and vulgarities, between Canning, Boyer and Sanke. Smith testified that the incident ended with Sanke yelling to the pickets ''that none of us worked there anymore'' and entered the building.

Canning and Boyer recalled the incident as occurring on or about June 25. Corroborating Smith, Canning testified that pickets were sitting on the tailgate of a station wagon parked by the rear parking lot when Sandy Sanke drove out of the parking lot in her pickup truck. As she passed by the employees, she rolled down her window and yelled ''chicken shit, you're all a bunch of chicken shits.'' Canning further testified that Sanke returned 30 minutes later, and, after the latter parked her car and was about to enter the plant building, she (Canning) asked Sanke if she thought that Canning was a ''chicken shit.'' Sanke said, yes, and they began arguing. Finally, Sanke told Canning to ''go find a life;'' Canning said she had one; and Sanke said, ''Not here anymore'' and ''You do not have a job here anymore.''[7] Insisting that she was unable to recall what may have been said prior to Sanke's comment, Roxanne Boyer only recalled that Sanke drove past Canning and her and into the parking lot and, upon getting out of her pickup, said, ''I don't know why you bitches are here. You don't have a job anymore anyway.'' She was also able to recall Canning responding, but not what she said.

There can be no doubt that Sanke's above-described invective had a lingering and deleterious effect on employee Canning. Thus, approximately 3 weeks later, on July 18, the latter, who carried a placard attached to a baseball bat, was picketing along with other striking employees when the replacement employees, who, at the time, totaled approximately 33, exited the plant building and walked toward a waiting bus, with Sandy Sanke escorting them. As the replacement workers began entering the bus,[8] Sanke turned and began walking back toward the plant building. Canning admitted that she walked after Respondent's credit manager, confronted her, and said, ''You still think I'm a chicken shit?'' Thereupon, asserting that ''it slipped,'' the baseball bat, which the employee was carrying, struck the ground. Sanke just continued walking toward the plant, and Canning followed for ''maybe five, six feet.'' At that point, Sanke turned and said to Canning, ''You don't have a job here anymore, go find a life.''

Striking employee Theresa Otto testified that she heard Sandy Sanke regularly shout similar comments at pickets during the summer months and that ''they weren't always in the same words, but she'd say it at least once a week.'' On one occasion in July, according to Otto, on a day a striker had to be taken to a hospital in an ambulance, Sanke came out of the plant and said ''she didn't know why we were all there, we had no jobs anymore.'' On other occasions, Otto recalled, Sanke's comments were ''she didn't know why we hung around'' and an admonition to never set foot in the door again. While denying that the striking employees ever said anything to provoke the comments from Sanke and unable to recall any employee responses, Otto did admit, during cross-examination, that strikers shouted at Sanke ''Leona'' and ''bitch.''

Finally, with regard to Sandy Sanke's comments to striking employees while they picketed outside the plant, is the testimony of Cindy Kruse. According to her, one day in July, Sanke walked outside from the plant building and stood approximately 25 feet from the pickets. Strikers began cursing and yelling to her ''why don't you give us a break'' and we're trying to be fair,'' and, according to Kruse, while unable to recall Sanke's exact words, ''she did say that we didn't have a job there no more, to get away from them and to go find a job.''

Terry Sanke testified that, on or about the second or third day of August, he became aware that supervisors allegedly had been making statements to striking employees, regarding resigning from the Union, and other, similar comments. Believing that such statements were inappropriate, Sanke thereupon spoke to his wife, Judy Lamphere, and Carol Tribble about the allegations. While there is no record evidence as to the responses of his wife or of Tribble, Lamphere, according to Sanke, denied making such statements. In any event, on or about August 8, Respondent posted the following letter, signed by Terry Sanke, on its plant bulletin boards and mailed copies to each striking bargaining unit employee:

> We have heard rumors that some strikers felt they were told that ''they no longer had jobs'' at the Company. This is inaccurate. Statements of this nature were not made or implied by F. L. Thorpe & Co., Inc. management. As economic strikers, you have the right to withhold your services. Additionally, you have all other rights that are guaranteed to economic strikers under the National Labor Relations Act. These, of course, include reinstatement to positions not now filled and other positions that open up if permanent replacements abandon their jobs. Any information that you have to the contrary is inaccurate and should be disregarded. If you have any questions, feel free to contact me.

A significant issue herein concerns the conduct, to which Sanke referred in the initial paragraph of his letter, allegedly engaged in by his wife during the months of June and July and whether or not such continued subsequent to the publication of the above-quoted letter. In this regard, Theresa Otto maintained that Sandy Sanke continued making statements, regarding the employment status of the strikers, after receipt of the August 8 letter. Otto specifically recalled one incident, ''within the first week after we received it,'' during which Sanke passed by the employee, who was picketing, and said

[7] During cross-examination, Canning changed Sanke's remark from ''Go find a life'' to ''Go find a job.''

[8] Canning's ex-husband, who was standing with the picketing strikers, ''happened'' to be carrying a live snake, and Sanke commented about his presence as the replacement workers approached.

''that I was a jobless wonder.''[9] Striker Susan Cox testified with regard to a Sanke comment, which she witnessed on August 22. According to Cox, 10 minutes before, in response to a request by Respondent, police had arrived at the plant to investigate a loud noise, caused by one of the pickets slamming a lid of a garbage can against the ground. The police departed, but moments later, when Sanke came outside with some replacement employees, who were on a break period, a rather loud and vulgar exchange of expletives and invectives ensued between the striking employees and Sanke. At one point, according to Cox, she heard Sanke shout '' we didn't have a job and we had repeatedly asked if she was our boss and the second time she didn't say anything, and the third time she said, 'Yes, I'm your boss, and go home.''[10]

Cindy Kruse also testified with regard to a comment by Sandy Sanke in August. After having her memory refreshed, she stated that, in mid-August, after receiving Respondent's August 8 letter, while picketing at the plant with approximately 15 other striking employees, including Kathy Bergstrom, Sanke came outside, and after the usual exchange of vulgarities and invectives occurred, Sanke said ''much the same thing. We didn't have a job there no more and go find another one.'' During cross-examination, Kruse changed her testimony, stating that she heard Sanke utter such a comment just one time, and such was prior to the August 8 letter. However, during redirect examination, when asked if she heard such a comment after the August letter, Kruse replied, with a clear lack of conviction, ''Yeah, I think I did.''

Striking employee, Katherine Bergstrom, testified that, in August, on several occasions when Sandy Sanke would enter or leave the plant employees would call her a ''grey-haired old bitch'' and ''Leona,'' and Respondent's credit manager would respond with comments, including ''we were jobless wonders, we were stupid, we were ugly, we were fucking bitches, how did it feel to walk the street, you're fired. . . .'' On one occasion, which Bergstrom specifically recalled as occurring after receipt of the August 8 letter, Sanke drove into the parking lot, got out of her car, walked to the employee entrance, and seemed to be waiting for someone to open the door. According to Bergstrom, she yelled to Sanke, ''Why didn't they give you a key to your own building? How can they lock you out,'' and Sanke ''told me I'm fired, go home.'' I said, ''stop firing me.'' She said, ''Get out of here, you're fired . . . . I don't want you around here, you're stupid.''

At this point, it is appropriate to consider the record evidence on the central allegation of the complaint—that, since on or about May 12, Respondent's aforementioned conduct, which occurred subsequent to the commencement of the strike and which was uncontroverted, had the effect of prolonging the work stoppage. At the outset, with regard to the motivation underlying the commencement of the strike, a desire to obtain a satisfactory collective-bargaining agreement from Respondent seems to have been the predominant, if not the only, consideration. Thus, Cindy Kruse testified that she participated in the original strike vote and that the underlying purpose was to gain a contract with a ''pay raise'' and better ''benefits.'' Likewise, Deborah Young, Theresa Otto, Roxanne Boyer, and Susan Cox testified that the purpose of the strike was to obtain a contract, one containing increased wages and benefits, and, in the words of Katherine Bergstrom, ''We wanted to be treated better by the employers.''

Turning to the effect, if any, of Respondent's alleged unfair labor practices committed subsequent to the commencement of the strike, as described above, I turn initially to consideration of whether or not the occurrence of each was disseminated among the striking employees. Initially, with regard to whether the alleged unlawful condition for returning to work, attributed to Supervisor Carol Tribble, was ever discussed, Linda Smith testified that she first mentioned what Tribble told her to a union official in late July and that, until then, she had never discussed the matter with anyone else. Cindy Kruse testified that she discussed Tribble's condition for returning to work with Smith and Deborah Young, and that, at a union meeting in the third week of May, Linda mentioned ''just what Carol Tribble told her.''[11] As to Sandy Sanke's conduct, the record reveals that such was a matter for discussion among the picketing strikers subsequent to each incident and at union meetings. Thus, employees Deborah Young, Katherine Bergstrom, and Roxanne Boyer testified that Sanke's asserted threats about strikers no longer having jobs were discussed by employees while picketing and at union meetings. According to employee Kruse, the August Sanke incident, about which she testified, was discussed by the pickets immediately after it occurred and was raised at a union meeting by one of the strikers, who ''just came right out and asked if she can get away with telling us we didn't have a job no more. . . .'' Finally, Theresa Otto testified that Sanke's constant comments were mentioned at ''every meeting'' of strikers, generating questions as to whether employees could be fired and what could be done about her comments. Also, testified Otto, Sanke's remarks were always discussed by employees while picketing, and seemed to result in anger and frustration as the strikers did not understand how they could constantly be fired.

While clearly, at least, the Sanke comments were widely disseminated amongst the striking employees during their union meetings and while picketing at Respondent's facility, there is no record evidence that these or Tribble's statements were ever discussed as reasons for continuing the strike or, indeed, for transforming it from an economic strike in support of contractual demands. Thus, for example, Katherine Bergstrom testified that, as the strike progressed, there was no change in the motivation for the work stoppage from that which existed at the outset—a desire to be ''treated fair.''

[9] Otto remembered this comment, in particular, as it lead to other strikers referring to her as ''Sandy's jobless wonder.'' Otto testified, during cross-examination, that Sanke uttered this comment on August 9 inasmuch as such was the date referred to in her pretrial affidavit. She added that she received the August 8 letter prior to that date just as she was sure she received Terry Sanke's April 27 letter prior to that date.

[10] Later, when asked by me and by counsel for Respondent to repeat what Sanke said, Cox failed to mention the ''we didn't have a job'' comment.

[11] It is unclear from Kruse's testimony whether Smith spoke about Tribble's statement to her to the assembled strikers or just to Kruse. Further, of course, Smith did not corroborate Kruse on this point, and Deborah Young did not testify as to being informed of Tribble's conduct. There is no record evidence of dissemination, among the striking employees, of Tribble's threat regarding setting back employee anniversary dates 1 week for each week of the strike.

Deborah Young could not recall any specific discussions as to an underlying rationale for continuing to strike, but ''I would suppose that we need a contract.'' Likewise, Roxanne Boyer, Susan Cox, Linda Smith, and Cindy Kruse could recall no other reasons for continuing the strike discussed other than ''a contract and for them to start negotiating.'' While apparently agreeing with the other employees that the underlying rationale for the on-going strike continued to be economic, the testimony of Theresa Otto suggests that the conduct attributed to Sandy Sanke clearly had the effect of angering the strikers. Thus, according to her, at union meetings, she heard such comments as ''if we didn't get a fair contract, it wouldn't matter to us if they went under.''

The employees' strike against Respondent continued through September, and, by the end of that month, Respondent had hired and employed approximately 28 permanent replacement employees and 20 bargaining unit employees, who either had not joined the strike at its inception or abandoned the strike, were working in the plant. On September 30, in response to unfair labor practice allegations that Carol Tribble had unlawfully informed Cindy Kruse and Linda Smith that they had to resign their union memberships in order to work for Respondent, Respondent offered reinstatement to their former positions of employment or substantially equivalent ones to the two employees, and, on October 7, advised each that the reinstatement offer included a promise to pay ''all back pay due.'' In addition to the reinstatement and backpay offers to Kruse and Smith, neither of whom personally responded to the offer, on October 4, Respondent mailed to every striking employee and posted on its plant bulletin boards, a letter, signed by Terry Sanke, advising employees that ''resignation of union membership is not and never has been a condition for returning to work for F. L. Thorpe''; and that ''no striking employees have been or ever will be discharged because they choose to exercise their lawful right to strike.'' In another letter, dated October 8, Respondent acknowledged the illegality of such conduct as informing striking employees that they were terminated or no longer employed, as telling employees they had to resign from the Union in order to return to work, and as telling employees that their anniversary dates will be set back 1 week for every week they continue to strike and promised not to engage in like future conduct. In response to Respondent's letters, on October 11, Delano Lords, a staff representative for the Union, mailed to Respondent a letter, stating an ''unconditional offer to return to work'' on behalf of all striking employees, including Kruse and Smith. As of October 14, according to Terry Sanke, Respondent employed 36 permanent replacement employees and 19 bargaining unit employees, who either did not choose to strike or abandoned the strike, and, after discussions between Lords and an attorney for Respondent, reinstatement letters were sent, by Respondent, to 21 former strikers, whose names appeared on a seniority list. Eleven of the employees accepted reinstatement, and, according to Sanke, Respondent failed to offer reinstatement beyond the 21st name as it had no more available positions.[12]

[12] According to Sanke, after the reinstatement offers, Respondent employed 36 permanent replacement employees, 19 cross-over employees, and 11 former strikers.

B. *Analysis*

The amended complaint alleges that, on April 28, Respondent engaged in conduct violative of Section 8(a)(1) of the Act by threatening an employee that, if the employees engaged in a strike, she would be required to resign her union membership before being permitted to return to work. Nevertheless, the record evidence establishes that the concerted work stoppage by 67 of Respondent's production and maintenance employees, which commenced on April 29, was an economic strike. Thus, several of the striking employees testified that the underlying purpose of the strike was to obtain a collective-bargaining agreement, which contained increased wages and benefits and provided for better treatment of the employees by Respondent. Conceding the economic motivation for the strike at its inception, counsel for the General Counsel argues that, as Respondent engaged in several serious unfair labor practices, violative of Section 8(a)(1) of the Act, during the pendency of the strike including threatening striking employees that they would have their anniversary dates set back 1 week for each week they remained on strike, threatening striking employees that, because they engaged in the strike, they were no longer employed by Respondent, and refusing to reinstate striking employees, following unconditional requests to return to work, unless they resigned their union membership, on or after May 12, the strike became converted to an unfair labor practice strike.

There can be no doubt that Respondent, in fact, engaged in the aforementioned alleged unfair labor practices.[13] With regard to the prestrike statement attributed to Supervisor Lamphere that striking employees would not be allowed to return to work unless they resigned from the Union, the Board has held that such statements, which condition employment upon union membership, are coercive within the meaning of Section 8(a)(1) of the Act. *Parkview Gardens Care Center*, 280 NLRB 47 (1986). Next, the record establishes that, within the first 2 weeks of the strike, Carol Tribble stated the aforementioned condition for being reinstated to striking employees Linda Smith and Cindy Kruse after each had expressed her desire to unconditionally return to work. Clearly, as stated above, an employer may not legally condition employment on union membership, and, by imposing such a restriction, as herein, on striking employees who express an unconditional offer to return to work, an employer engages in conduct violative of Section 8(a)(1) and (3) of the Act. *Gaywood Mfg. Co*., 299 NLRB 697, 699 (1990); *Chicago Beef Co*., 298 NLRB 1039 (1990). Next, turning to Tribble's warnings to Smith and Kruse, that the employment anniversary date of each would be pushed back 1 week for each week she remained on strike, an employer may not legally penalize employees for engaging in the most basic of protected concerted activities—a strike, and statements, which threaten the imposition of such a penalty, are utterly coercive within the meaning of Section 8(a)(1) of the

[13] In so concluding, I have credited the testimony of each of the witnesses, who testified on behalf of the General Counsel. In this regard, I note that, as Respondent failed to call any witnesses, their respective testimony was uncontroverted. Moreover, notwithstanding any difficulties presented by internal contradictions, none of the witnesses was inherently unreliable, and, accordingly, I shall rely on their recollections of events herein, except where two witnesses conflict or contradict each other.

Act. Finally, with regard to the numerous remarks to picketing strikers, attributed to Sandy Sanke, during the pendency of the strike, by each witness who testified on behalf of the General Counsel, that they no longer had jobs with Respondent, that they no longer worked at the plant, or that they were fired, Board law is clear that the strikers remained employees, within the meaning of the Act, during the strike, and, therefore, her remarks clearly constituted coercive conduct, violative of Section 8(a)(1) of the Act. *Champ Corp*., 291 NLRB 803, 804 (1988). The fact that none of the striking employees, to whom Sanke's comments were directed, was actually terminated does not diminish their coercive character, and, given that the remarks were uttered by a high management official and that Respondent obviously controlled the employment relationship, the fact that Sanke's remarks may have been provoked by invective from the strikers does not vitiate their illegality.

Based upon the record evidence of unfair labor practices during the ongoing strike, one may argue, as does counsel for the General Counsel, that the employees strike against Respondent obviously was prolonged by the latter's conduct. However, the Board has long held that ''an employer's unfair labor practices do not ipso facto convert [an economically motivated strike] into an unfair labor practice strike.'' *Gaywood Mfg. Co.*, supra at 700. Rather, as the Board explained in *C-Line Express*, 292 NLRB 638, 638 (1989), ''the General Counsel must establish that the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage.'' Inasmuch as establishing the existence of the necessary causal linkage between the unfair labor practices and the continuation of the strike is often difficult and not susceptible to certain evidentiary analysis, the Board utilizes both objective and subjective considerations in resolving cases, involving this issue. In this regard, the Board adheres to the guidelines established by the First Circuit Court of Appeals in *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1080 (1981):

> Both objective and subjective factors may be probative of conversion. Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and the court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice. *Did they continue to view the strike as economic or did their focus shift to protesting the employer's unlawful conduct*? [Emphasis added.]

Notwithstanding that, in many cases, there will be record evidence sufficient to afford it the opportunity to evaluate striking employees' subjective reactions to their employer's unlawful conduct in order to evaluate whether such prolonged a work stoppage, the Board has recognized that ''the presence or absence of evidence of such subjective motivation has not always been the sine qua non for determining whether there has been a conversion'' and that certain types of unfair labor practices, which ''by their nature will have a reasonable tendency to prolong [a] strike . . . afford a sufficient and independent basis for finding conversion.''[14] *C-Line Express*, supra at 638.

Regarding the striking employees' subjective motivations, the single most compelling aspect of the entire record is that each of the former striking employees, who testified on behalf of the General Counsel, stated that, notwithstanding the aforementioned unfair labor practices committed while the strike continued, the discussions at their union meetings, with regard to continuing the strike, centered on the need for a collective-bargaining agreement and on the desire to be treated fairly in any agreement. Other than Theresa Otto, not one witness mentioned the unfair labor practices as even being a factor in the decisionmaking process, and Otto's recollection was that Respondent's unlawful conduct merely had the effect of angering and frustrating the strikers rather than altering their goals for the strike. In *Gaywood Mfg. Co*., which, as herein, concerned whether an employer's statements, that employees, who had unconditionally offered to return to work, would have to resign their memberships in the union in order to return to work, converted an economic strike into an unfair labor practice strike, the Board placed significant emphasis on the probable consternation such conduct caused among the employees as evidenced by widespread dissemination of the conduct. Herein, other than evidence that former striking employees Smith and Kruse discussed what Tribble said between themselves and mentioned it to a union official and, perhaps, to another striking employee, there is no evidence that Tribble's condition for returning to work was generally disseminated to other striking employees or that the latter were even aware of Respondent's unlawful conduct. In contrast to the lack of dissemination of Tribble's stated condition for returning to work, the record establishes that the multitudinous remarks of Sande Sanke, to the effect that the striking employees no longer had jobs and were fired, were widely discussed among the striking employees while they picketed at Respondent and attended union meetings. Nevertheless, not one of the former striking employees testified that the goals and aspirations of the strikers ever changed, as a result of Respondent's unfair labor practices, from their motivation at the outset of the strike against Respondent, with such remaining the desire for a collective-bargaining agreement which assured them improved working conditions and fair treatment.

Turning to the objective considerations herein, the Board has held that ''Respondent's unlawful conditioning of reinstatement on resignation from the Union is comparable in effect to conduct such as unlawful withdrawal of recognition during an economic strike—an unfair labor practice that, by its nature, has a reasonable tendency to prolong the strike.'' *Gaywood Mfg. Co*., supra at 700; *Chicago Beef*, supra. In so concluding in *Gaywood Mfg*., the Board added that such statements, as made by Supervisor Tribble herein, ''would necessarily delay resolution of the strike by creating an issue to be resolved individually by striking employees who had made or were willing to make unconditional offers to return to work—i.e., whether the employee should resign from the Union in order to make an offer to return that would be acceptable to the Respondent.'' Id. Based on the foregoing,

[14] Said unfair labor practices, normally occurring during the bargaining process, include a withdrawal of recognition and certain acts of bad-faith bargaining.

counsel for the General Counsel asserts that, notwithstanding the subjective evidence herein, including the former striking employees' own belief that the objective of the strike against Respondent, even in the face of unfair labor practices, remained economic, the mere existence of evidence, establishing the resignation from union membership condition for returning to work, satisfies the General Counsel's burden of proof that Respondent's misconduct prolonged the strike, thereby converting it to an unfair labor practice strike. Contrary to counsel for the General Counsel, Respondent's counsel argues that the subjective evidence herein may not be ignored and that an assessment as to the probable impact of unfair labor practices is required ''only absent'' credible evidence of the ''actual'' impact of unlawful conduct, as herein involved.

Analysis of *Gaywood Mfg. Co*. has convinced me that counsel for the General Counsel has misconstrued the Board's holding therein and, therefore, has wrongly ignored the best evidence of the motivation underlying the continued strike against Respondent—the testimony of his own witnesses, which establishes the continuing economic motivation for the strike. Thus, while counsel correctly noted the rather sweeping language of the Board in the body of its decision, he failed to note, in a footnote, the Board's specific reliance, for its holding, on crucial evidence of dissemination of Respondent's unlawful condition among the striking employees. Therefore, it must be concluded that, notwithstanding the Board's above-quoted broad view the effect of conduct, as engaged in by Respondent, the subjective fact of dissemination remains necessary to establish that the effect of the conduct was not isolated. Id. at fn. 16. Herein, of course, the opposite is true. The instant record evidence will only clearly support a finding that Tribble's unlawful condition for returning to work was discussed between striking employees Linda Smith and Cindy Kruse, the only two recipients of said unlawful conduct subsequent to the start of the strike, with any evidence of broader dissemination virtually nonexistent and problematical at best. Thus, while Kruse testified that Smith raised Respondent's unlawful condition for returning to work at a union meeting in late May, Smith testified that she mentioned what Tribble had said only to a union official at a meeting in July. Further, while Kruse testified that she told fellow striker, Deborah Young, about Tribble's statement, Young failed to corroborate her on this point. Therefore, the crucial fact of dissemination of Respondent's unlawful condition is lacking herein, and, I believe, given that only 2 of the 67 striking employees were aware of the unlawful condition for returning, Tribble's conduct may be considered isolated and deference must be given to the former strikers' own testimony as to the continued economic rationale for their strike against Respondent.[15] Accordingly, counsel for the General Counsel's contention, that Respondent's unlawful conditioning of reinstatement on resignation from the Union is sufficient by itself to have converted the employees' economic strike into an unfair labor practice strike, is without merit.

With regard to Sandy Sankes comments to picketing strikers, during June, July, and August, while there was record evidence of wide dissemination of her comments among the striking employees and of the anger and frustration resulting from her conduct, there is no record evidence that such had any impact on the underlying rationale for the strike, which always remained directed toward obtaining a favorable collective-bargaining agreement. Arguing in a similar vein as above, counsel for the General Counsel, citing *Astro Electronics*, 188 NLRB 572 (1971), argues that Sanke's comments, that the striking employees were fired and did not work at the plant anymore, prolonged the strike by creating new issues that required resolution and, therefore, in and of themselves, converted the strike into an unfair labor practice strike. The cited decision however, is distinguishable, as therein the Board found that the strikers were actually terminated when the respondent said they were fired if they walked out the door. Id. at 572. In the instant matter, there is no contention that any of the recipients of Sanke's unlawful comments were actually terminated, and the fact that Respondent failed to make good on their threats removes the creation of a new issue against which to protest and, thereby, delay resolution of the strike. *C-Line Express*, supra at 639. Therefore, as above, there exists no reason not to credit the former striking employees at their word and find that the underlying motivation for the strike remained, at all times, economic. Accordingly, I find, in agreement with Respondent's counsel, that the strike against Respondent, which lasted from April 29 until October 11, remained what it was at its inception—an economic strike designed to obtain a collective-bargaining agreement—and that it never converted into an unfair labor practice strike. In these circumstances, I further find that, on October 11, when the striking bargaining unit employees unconditionally offered to return to work and end their strike, Respondent was not obligated to treat them as unfair labor practice strikers or to offer immediate reinstatement to them, and I shall recommend dismissal of the 8(a)(1) and (3) allegations of the amended complaint in that regard.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On or about April 28, Respondent threatened an employee that if she engaged in a strike, in order to return to work, she would be required to resign from the Union and, thereby, engaged in conduct violative of Section 8(a)(1) of the Act.

4. Respondent's employees commenced an economic strike, in order to obtain a collective-bargaining agreement, on or about April 29.

5. On or about May 5 and 12, Respondent informed employees, who had made unconditional offers to return to work, that, prior to being reinstated to work, each had to resign her membership in the Union and, thereby, engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

[15] While, of course, former striker Susan Cox was also the recipient of an identical statement of the condition for returning from Supervisor Lamphere, such occurred prior to the start of the strike, the General Counsel concedes the strike was economically motivated at the outset, and evidence that such was disseminated to any other striker was not placed in any time frame. Also, there is no evidence that Tribble's threat, regarding setting back employees' anniversary dates for each week of the strike, was ever disseminated to any other employee.

6. On or about May 5 and 12, Respondent threatened striking employees that they would have their employment anniversary dates set back 1 week for each week they remained on strike.

7. On several occasions in June, July, and August, Respondent informed striking employees, who were picketing at Respondent's facility in support of their strike, that they were fired, did not have jobs any longer, and did not work there any longer, and, thereby, engaged in conduct violative of Section 8(a)(1) of the Act.

8. For its duration, the employees' strike against Respondent continued to be an economic strike and never converted into an unfair labor practice strike, and, when the strikers unconditionally offered to return to work, Respondent was under no statutory obligation to offer immediate reinstatement to them.

9. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Unless specifically found herein, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions which are designed to effectuate the policies of the Act. Further, with regard to employees Linda Smith and Cindy Kruse, I have found that each unconditionally requested reinstatement in early May and that Respondent, in violation of Section 8(a)(1) and (3) of the Act, conditioned such upon their resignation from the Union. I have also found that, by letters dated September 30, Respondent offered each reinstatement to her former position of employment or a substantially equivalent one. The letters gave each 10 days, from the date of receipt, to accept the offer, and, on October 11, the Union, on behalf of each striking employee, including Smith and Kruse, made an unconditional offer to return to work. On November 18, Respondent offered reinstatement to Linda Smith, but, according to General Counsel's Exhibit 25, she was unqualified for the position and either declined reinstatement or was denied such. As far as can be determined from the record, Cindy Kruse has never been reinstated. Accordingly, as it appears that, by the Union's letter of October 11, Smith and Kruse accepted Respondent's offer of reinstatement, as Kruse has never been reinstated to her former or an equivalent position, and as it is unclear whether Smith was reinstated in accord with Board law, I shall recommend that the standard remedy in 8(a)(1) and (3) discharge cases be applied to both and leave it to the compliance stage to ascertain the true facts as to Smith. Therefore, it shall be recommended, as to Smith and Kruse, that Respondent be required to immediately reinstate each to her former position or, if not available, to a substantially equivalent position, without impairment of her seniority and other rights and privileges. Further, each shall be made whole for any loss of earnings she may have suffered by reason of Respondent's unlawful condition imposed after each unconditionally offered to return to work from the strike in early May. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, Respondent shall be ordered to post a notice, setting forth its obligations herein.

[Recommended Order omitted from publication.]